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SUBROGATION UNDER WORKMEN'S COMPENSATION— TOO MUCH OR TOO LITTLE

DONALD CAMPBELL*

WORKMEN'S compensation legislation in the United States is little more than thirty years of age.¹ Although conceived in Europe at an earlier date, and operating with success abroad, its significance was not recognized here, and American employers continued to follow principles inherited from laws abandoned at their source. Employers were entrenched, and labor bodies were divided in their opinions as to the most effective means of bettering the situation created by industrial accidents, which crippled the family bread winner, entailing financial, social, and moral losses. Proposed remedial laws were thought of as labor legislation rather than social measures.² The beneficiary of the enactments was to be the employee whose misfortunes, suffered because of industrial accidents, should be charged directly to his employer.

The employer, primarily liable for the payment of compensation, has received less attention from the legislatures than has been accorded to the employee, whose welfare was the main concern. There is no doubt but that the prime object rather successfully attained by the enactments is the speedy and certain, although limited, compensation of those injured in industrial accidents, with immediate benefit to their dependents. The risk of accident with coincident money costs

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¹ An act, limited in application, was passed by Congress and in effect in 1908. Wisconsin passed the first compensation act May 3, 1911.

² Beckner, *A History of Illinois Labor Legislation*, Ch. XV. University of Chicago Social Science Studies (1929). Illinois typifies the history of labor legislation and compensation acts throughout the states.

has been shifted to the master who in turn will shift these expenses to the consumer of his products as part of the cost of production. This is theory, although it may well be urged on the part of the employee that the difference between his wages and the limited compensation he is paid when injured is his contribution unabsorbed by master or consumer.

The underwriter has been active in assuming the master's burden for a consideration which in the end must not only be greater than the apprehended cost but must reimburse the insurer for his expense of administration incurred in establishing and limiting the compensation payable. In this process, he acquires equities which must be considered in the final settlement.

Compensation acts were primarily concerned with the relation between employer and employee and the legal rights and liabilities flowing therefrom. These two persons joined in fact and in law were bound to come into accidental collision with other groups in similar relations as well as with still other employers and employees and individuals who were not bound by the acts. Impingement was to be expected; nor could a statute be written that would anticipate, encompass, or control all the legal effects of such contacts. To this already fairly complex group came the insurer to whom many statutes make no reference whatever as a subrogee.³

Entire justice to the employee, the employer, and the insurer seems Utopian. Not all situations produce a wrongdoing scapegoat from whom all may secure indemnity in his proper turn. In many instances a legal right may arise because of contract that produces conventional subrogation. In many instances, equitable circumstances will indicate that subrogation is proper without formal agreement.⁴ The wording of the statute may create substantive rights, or prevent enforcement of rights.⁵ The matter of procedure may make

³ Nineteen states (as of January, 1940) made no mention of the insurer as subrogee in the compensation act. However, this does not mean necessarily that the courts of the states making no specific mention of subrogation to carriers will not permit an indemnity action.

⁴ *Travelers' Insurance Co. v. Great Lakes Engineering Co.*, 184 F. 426, 36 L.R.A. (N.S.) 60 (1911); *Foster & Glassell Co. v. Knight Bros.*, 152 La. 596, 93 So. 913 (1922).

⁵ The obvious purpose of all compensation acts is to give a statutory right in substitution, or in addition to a common law right, or to create a cause of action where, under the circumstances, no right would arise. For an early discussion and

enforcement of rights impossible or impracticable.⁶ In many instances the goat will escape. How definitive or applicable the statute was intended to be will be discovered only after many cases have passed through the reviewing courts and possibly to the courts of last resort.

It is toward the rationale of subrogation as applied to workmen's compensation, and a consideration of the causes which have prevented its application, as well as to alternative suggestions and the tendency toward further statutory delineation that this paper is directed. It is appreciated that the main, perhaps the sole, purpose of the legislatures in enacting compensation acts was the advancement of the welfare of the industrial workers, but even in the absence of specific direction in the acts, the equitable principle of subrogation is bound to appear as a justifiable matter of consideration to a rational mind.

In view of the diversity of results reached by the courts in cases where the operative facts are identical or very similar, it must be conceded that provision for subrogation in the compensation statutes has not functioned with anything like perfection, certainty, or uniformity. With the exceptions of New Hampshire, Ohio, and West Virginia⁷ all state compen-

decision of the constitutional aspects and the social implications, see *New York Central R.R. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

⁶ In New York, a workman under the compensation act was killed by falling into a furnace because of the breaking of an arch defectively installed by a third party. His employer, through its insurance company, paid the compensation and sought indemnity from the third party. The deceased employee had several children, of whom two were over eighteen years of age, and therefore did not share in the compensation awarded. The New York Death Act allowed suit only by the personal representative for the benefit of all of the next of kin. The court held the insurance company could not split the cause of action for its own benefit; the carrier was subrogated only to the rights of the employee who had none under the circumstances and the statute. *Liberty Mutual Ins. Co. v. American Incinerator, Inc.*, et al., 51 F. (2d) 739 (D.C.S.D. New York, 1931). To work out the equities in this case seems an insuperable task because of both substantive and adjective law. On substantially similar facts, the Supreme Court of Washington found splitting the widow's cause of action no obstacle to a suit by the state fund for indemnity. *State v. Vinther*, 183 Wash. 350, 48 P. (2d) 915 (1935), adhered to in 186 Wash. 691, 58 P. (2d) 357 (1936).

⁷ Prior to 1939 Wyoming was singularly different from all other states, in that its statute provided that where there was a legal liability in some person other than the employer, the employee was left to his remedy at law against such other person, and the employer was not liable for compensation. By an amendment of February 23, 1939, the employee may now take compensation and also sue the third person, but in case of recovery, he must reimburse the state accident fund. Arkansas has framed an act to be submitted to the people of the state on referendum this year. Mississippi has no compensation act.

sation acts contain some provision for recoupment or recovery in the nature of indemnity by the paying party against the one whose negligence or fault has produced the compensable accident if there be such a one. Yet an examination of the cases leads to the belief that statutory authority to accomplish this obviously just result has often been too specific, and consequently too limited. Under cover of technical obstacles of both substance and procedure the wrongdoer has often escaped, or the real indemnitor has gone without indemnity.⁸ Is it possible omission from the acts of any provision for subrogation, or perhaps inclusion of a provision for subrogation only in most general and comprehensive terms, might have produced more uniform results? Comparisons were possible with other fields in which the equitable principles of subrogation were already recognized and operating.

Without further inquiry into the considerations which must have weighed differently with the legislatures creating the acts, and without characterizing at this time the considerations that must have been of influence with the judges in the application of a new law to the complex facts presented to them, one will hardly need deny that there are hundreds of highly contradictory decisions incapable of being explained solely on the basis of dissimilarity of statutory provisions.

Perhaps the right of subrogees are of such minor consequence that until other more important provisions of the acts are worked out with clarity, fixity, and more or less uniformly anticipated results, the former may be relegated to secondary interest. The Supreme Court of Illinois has stated that indemnity for the employer where the employee was injured by a third person was in the mind of the legislature secondarily under Section 29.⁹ A few of the stock situations

⁸ In the case of *New York, S. & W. R. Co. v. Huebschmann et al.*, 111 N.J. Eq. 547, 162 A. 767 (1932), as in many cases similarly decided, the court said that subrogation under workmen's compensation was purely statutory, and, as the statutes specifically provided for subrogation to the employer, there should be none for any one else. An amendment to the New Jersey act in 1931 let in the insurance carrier, but the new law is still unsatisfactory in that it permits the action or inaction of the employee to determine the rights of the insurer. See 4 *Mercer Beasley Law Review* 98, and the comment on *Scheno Trucking Co., Inc. v. Bickford et al.*, 115 N.J. Eq. 380, 170 A. 881 (1934), where the amended law was applied.

⁹ *Baker & Conrad v. Chicago Heights Construction Co.*, 364 Ill. 386, at 393, 4 N.E. (2d) 953 (1936). And in *Walters v. Eagle Indemnity Co.*, 166 Tenn. 383, 61 S.W. (2d) 666 (1933), it was held that the compensation act subrogating the

most frequently arising are here set out, although the recital may be superfluous as to those who are familiar with the field.

An employee driving a truck for his employer, both of whom were "under the act," is injured by an automobile negligently operated by a third person. Under compensation acts, the employer will be liable for compensation to his injured employee regardless of fault. The employee may accept compensation. In this case his employer (or insurance carrier) will have a right of subrogation against the negligent third party and should recover indemnity in a law suit against the wrongdoer. The employee may decide that he has a good common-law cause of action against the negligent party and that he will be able to recover *damages* greater in amount than compensation. In this instance, he may not only accept compensation from his employer but also sue the third party. In case of recovery of damages he should reimburse his employer for the compensation he first accepted. But the compensation act may be worded so that the employee must choose which course to pursue, and a choice of one remedy may exclude the other. Or the compensation act may leave the employee no choice but compensation if the wrongdoer was also "operating under the act." And if the wrongdoer was a "fellow servant" in the employ of the same master, public policy announced in the act or stated by the court may prevent a common-law suit against the fellow servant, or the employee may sue the fellow servant at law, and the court, because of public policy, will declare that the employer may not be subrogated nor have indemnity from any amount recovered. The compensation act may provide that joint action should be brought against the third party; so both employer and employee may be assured of court protection of their interests—the employer in that he may recover what he has paid or may be called upon to pay as compensation, and the employee in that he may recover at least compensation, or perhaps a greater sum generally expressed as compensatory damages as distinguished from the limited amount of statutory compensation.

employer to the right of action of the employee where compensation has been awarded, was enacted for the employer as an integral part of the scheme of compensation.

It will be readily observed that the rights of the parties concerned will be to a considerable degree determined by the statutes rather than upon quasi-contractual or equitable principles, as the statutes may measure out the rights, and prescribe methods of procedure. The rights should be fairly certain, and the principles should apply whether the injury to the employee is temporary or results in his death.

Subrogation is readily defined, but in its application to particular classes of cases it may require some variation in the language employed. "The doctrine of subrogation is a pure unmixed equity, having its foundations in the principles of natural justice."¹⁰ One who pays, otherwise than a volunteer, a debt for which another is primarily liable, is given by equity the protection of any lien or other security for the payment of the debt to the creditor, and may enforce such security against the principal debtor.¹¹

It does not appear that difficulty should be encountered in applying the doctrine of subrogation to any situation that might arise under the compensation acts. More appropriate occasions than the typical compensation cases would be hard to find.¹² The analogy to debtor-creditor-surety cases seems

¹⁰ *J. Miller in Aetna Life Insurance Co. v. Middleport*, 124 U.S. 534, 8 S. Ct. 625, 31 L. Ed. 537 (1887).

¹¹ *McClintock, Equity*, § 119, p. 211.

¹² Inasmuch as the early cases of subrogation dealt with the surety, the creditor, and the principal debtor, and the securities safeguarding payment of the debt, the definition given seems quite clear and concise. Historically bridging, from the early cases where the doctrine of subrogation was originally announced, down to the cases involving compensation, it may be noted that after the concept was sufficiently imbedded in the law, the insurers of fire and marine risks found subrogation most useful in recouping losses paid, where the loss was caused by the wrongful act of a third person. At a still later date inland carriers were called upon to answer to insurers who had paid losses to shippers and had become thereby subrogated to claims against the carriers. At a much later date, but soon after the inception of the compensation acts and payments made thereunder, the courts were called upon to enforce rights of action acquired through subrogation by the employers who had paid the required compensation to employees injured through the fault of some third person. This situation was not unknown before the compensation acts, for suits seeking indemnity had already been filed by masters against those who had injured their servants and thereby occasioned loss to the masters. Of course, no security or lien is here involved as in the original debtor-creditor cases, but the concept of subrogation is sufficiently fluid and expansive to carry the application, to the shipper-carrier cases. To the widening stream of subrogation is now added the insurer who bears the risks of the employing masters. The doctrine should be "broad enough to include every instance in which one party (other than as a volunteer) pays an obligation for which another is primarily liable, and which in equity and good conscience should have been paid by the latter." Quotation from *Sheldon's Subrogation* (2d ed.) § 11.

close and obvious. The similarity to shipper-carrier-insurer cases, and to assured-indemnity insurer and tort-feasor cases is quite apparent.¹³ It is true enough that equities of the recited parties could not be entirely adjusted in courts of law under all circumstances or perhaps at law at all at first. But under enlightened rules of procedure and by virtue of the growth of codes of practice these earlier obstacles to the enforcement of subrogation rights have been nearly eliminated. However, even today in a majority of jurisdictions if the cause of action to which the subrogee claims to be subrogated is an equitable one, he must sue in equity and may sue in his own name. Conversely, however, if the claim on which the subrogation is founded is cognizable at law, the action of subrogation should be sustained at law. While originally the subrogee would sue "for use of" etc., the "real party in interest," statutes may require that the action be brought in the name of the subrogee, and local statutes may require further disclosures of the transaction by recitals or affidavits.¹⁴ A modern view of subrogation circumspectly and judicially applied to the cases should bring about just and equitable decisions for all parties, unless hampered by express statutory limitation or by narrowly sticking to the letter in the interpretation.

In a review of decided cases, the factors most operative

While the older cases held that the subrogee must have actually paid, the newer cases, especially those resting upon statutory sanction and applied to compensation cases, generally hold that subrogation occurs even before payment, if it has been "fixed" or determined. *Friebel v. Chicago City Ry. Co.*, 280 Ill. 76, 117 N.E. 467 (1917). And it has been so held even before an award, where the employer's liability was created by the act, and the statute authorized the potential indemnitor's action against the third party tortfeasor. *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 P. 800 (1920). And in *Sanders v. National Biscuit Co.*, 172 N.Y.S. 917 (1918), it was held that the election of the employee to take compensation ipso facto assigned his claim and created actionable subrogation.

¹³ Various writers have seen an analogy in compensation cases to cases involving life and accident insurance, and as there is admittedly no indemnity available to the paying insurer in such cases, these writers have been unable to believe subrogation truly applicable to compensation cases in the absence of statute. For this view see 38 Harv. L. Rev. 971 at 972, and to the contrary Vance, Insurance (2d ed.) p. 680 and notes; T. P. Hardman, "The Common-Law Right of Subrogation Under Workmen's Compensation Acts," 26 W. Va. L. Rev. 183 at 184 et seq.

¹⁴ It has been stated that the doctrine of subrogation has progressed in much the same way as the doctrine of assignment, and that it has encountered and overcome procedural difficulties in much the same manner. See *Offer v. Superior Court*, 194 Cal. 114, 228 P. 11 (1924).

in preventing legal subrogation to which the courts apparently gave the greatest weight seem to have been, in the main, statutes, procedure, timing, public policy.

If compensation acts are viewed in the light of their avowed purpose and if the peculiarly appropriate situations for the application of subrogation principles where a third-party tort-feasor is involved are borne in mind, subrogation should be allowed even in the absence of express legislation, unless the subrogation were applied in such a manner as to defeat the main purpose of the act. The accurate definition of subrogation as a principle of equity should forestall this result. The idea of legal subrogation not based on contract nor on statute has not been well received, although as early as 1911 an early federal decision explored the idea thoroughly and reached a desirable affirmative result.¹⁵

The time has gone by for a discussion of the possibility of subrogation in the absence of statutes, since almost all states have enacted, amended, and re-enacted statutes, rather explicitly defining and limiting the circumstances and the extent of subrogation. A workable application of legal subrogation without statutory sanction was concisely presented by Professor Thomas P. Hardman in the *West Virginia Law Quarterly* in 1920.¹⁶ Since that article appeared, the legislatures have put in twenty years of alterations on the acts and no state has been content to let legal subrogation be applied solely by the judiciary.

If at the inception of workmen's compensation acts, the states had uniformly made the employer immediately and directly liable for payments for both injuries and deaths under the acts and had followed this by the allowance of joint actions commenced by either employer or employee or the latter's representatives against wrongdoing third persons, with equitable adjustment of the proceeds of such actions under court control and approval, little would be left to differ about other than the liability of "fellow employees," and "fellow employers" who were also under the act. Even as to these, the act could have announced the public policy which

¹⁵ *Travelers Insurance Co. v. Great Lakes Engineering Works Co.* 184 F. 426, 36 L.R.A. (N.S.) 60 (1911).

¹⁶ T. P. Hardman, "The Common-Law Right of Subrogation under Workmen's Compensation Acts," 26 W. Va. L. Quart. 183 (1920).

would be based upon the desirability of permitting law actions against them for damages, or confining the actions to indemnity, or denying a remedy at all in the case of the "fellow employee." Settlements out of court with third parties should be by agreement only with court or commission approval.¹⁷

Unfortunately, no uniformity occurred, and by 1924, when compensation acts had been passed by forty-two states, the statutes of Arizona, Montana, New Hampshire, Ohio, Utah, and West Virginia of these forty-two contained no provision as to the rights of employer and employee against third-party wrongdoers.¹⁸ As to the thirty-six states providing for such rights and expressly stating the liability of the third person, these differed in that in Massachusetts the employee was faced with an election to proceed against his employer or the third person; in Rhode Island, the employee could proceed against both but recover from only one; in California, he could proceed against both and recover from both, but if he recovered from the third person, he would then need to indemnify the employer who had paid.

In each of the thirty-six states of which the three just mentioned are given as samples of groupings, the employer who had paid compensation was subrogated to the rights of the employee against the third person (Wyoming excepted).¹⁹ If the action of subrogation were instituted by the employer in ten of the thirty-six states, he could recover only the compensation paid or payable; in nineteen, he could recover the employee's full damages, but was required to pay the excess over to the employee; and in the remaining six states, the awarding of compensation was said to be an assignment of the employee's cause of action to the person or carrier who had paid the compensation. This left open a possibility that under the assigned cause of action, the employer or carrier who had paid compensation, only, might recover more than his payments. Happily this result was reached

¹⁷ California has at present substantially these rather perfect provisions. See California Code of 1937, Workmen's Compensation Act, and amendments to include 1939.

¹⁸ Summary taken from 38 Harv. L. Rev. 971, citing from Hill & Wilkin, Workmen's Compensation Statute Law.

¹⁹ Ibid.

only in New York, and the law was subsequently amended.²⁰ Equally as illogical is to permit double recovery by an employee through acceptance of compensation, and damages by suit, yet it has occurred under authority of the statute.

It is to be held in mind that uniformity is not the zenith of consideration, and that even the equitable principles of subrogation²¹ must properly fit into the spirit and purpose of workmen's compensation acts. However, there seems to be no good reason for not attempting a uniform and predictable result in the consideration of third party liability, particularly where the third person is a stranger to the act. And a plain statement of the liability of a fellow employee would announce the public policy of the state, while a division of third-party employers into "within" and "without" the act would enable their liability to be measured in terms of compensation or of damage, in which public policy would again be largely controlling.

STATUTORY CHANGES

The trend of statutes generally has been toward a sharper delineation of the rights of all parties concerned, but leaving ample room for judicial construction, and unfortunately, still ample room for procedural problems.

In Nevada, North Dakota, Ohio,²² Oregon, Washington, and Wyoming, as of January, 1940, all compensation is payable from a state fund only, except that in Ohio the employer, under state approval, may carry his own risks uninsured. Where the state has a monopoly of compensation insurance as in these states, the private carrier will not figure in litigation of local creation. In these states the employee has the option, forced at times,²³ to elect compensation or sue the

²⁰ *Travelers Insurance Co. v. Brass Goods Mfg. Co.*, 239 N.Y. 273, 146 N.E. 377 (1925), discussed in 38 Harv. L. Rev. 971.

²¹ *Klotz v. Newark Paving Co.*, 86 N.J. Law 690, 92 A. 1086 (1914).

²² In West Virginia, employers may carry their own risks but they must contribute to the expense of administering the state fund. Although Ohio forbids insuring of workmen's compensation liability in order to create a monopoly in the state, yet a suit could be maintained in Ohio courts against an Ohio corporation by a foreign insurer subrogee as provided for under Alabama law where the cause of action arose and compensation became payable. *American Mutual Liability Ins. Co. v. U.S. Electrical Tool Co.*, 55 Ohio App. 107, 9 N.E. (2d) 157 (1936).

²³ In Oregon, the employee has an option to accept compensation, or to sue the third person. If he accepts compensation, his right of action is assigned to

third party. If he elects compensation, the state fund or commission will be subrogated to his action, or, as in Oregon and Washington, his cause of action will be assigned to the state fund. Should the fund or commission recover, the excess goes to the employee. If the employee sues, his compensation will be properly diminished by the recovery. The employer does not figure in the litigation.

In West Virginia, although a state fund is established, the employer under certain conditions may carry his own risk, and he is not prohibited from insuring with a private carrier. The compensation statute, however, deals solely with employer and employee and makes no reference to third parties. It simply creates a fund to which the employee may apply for compensation and "partakes of the nature of pension." There is nothing in the statute which would prohibit an employee who has received damages from a third party from receiving compensation for damages arising from the same act.²⁴ The possibility of double recovery was recognized but disregarded. No cases in West Virginia seem to have dealt with this problem directly presented.

The year 1940 finds New Hampshire unchanged. Compensation is at the option of the employee. There is no provision for subrogation of any kind, and the employee may disregard the compensation act and sue his employer at law, or he may make application for compensation under the act. The employee may sue the third party and collect damages and in addition may claim compensation from his employer.²⁵ In view of these possibilities, it seems peculiarly inconsistent to hold that a release (or receipt) for compensation should bar the employee's claim for damages against a third party, but it was so held in *Mullins v. Merchant's National Bank*.²⁶

Arizona, California, Colorado, Idaho, Maryland, Michi-

the state; if he sues, the state fund is liable for a deficiency. If within twenty days after notice from the Commission the employee fails to file written election to sue, he is deemed to have elected compensation. Oregon Code 1930, sec. 49-1814, 1814a, and amendments of 1933, construed in *King v. Union Oil Co. of California*, 144 Ore. 655, 24 P. (2d) 345 (1933); *Walter v. Turtle*, 146 Ore. 1, 29 P. (2d) 517 (1934).

²⁴ *Mercer v. Ott*, 78 W. Va. 629, 89 S.E. 952 (1916).

²⁵ *Holland v. Morley Button Co.*, 83 N.H. 482, 145 A. 142 (1929).

²⁶ 88 N.H. 90, 184 A. 565 (1936).

gan, Montana, New York, Oklahoma, Pennsylvania, Texas,²⁷ and Utah have state funds, but private carriers are permitted. Their statutes provide for subrogation or "assignment" usually to the state fund, or the employer, or insurance company, or person who shall have paid or become liable to pay the compensation.

Of the remaining states, where only private insurance exists, the statutes of nineteen make no specific mention of the private insurance carrier as subrogee or assignee. In six states this is because of the state monopoly of insurance, in which the statute may provide for assignment of the cause of action to the fund. In thirteen states,²⁸ the statute is simply silent.

The unique positions of New Hampshire and West Virginia have already been referred to. Mississippi has as yet no compensation act and Arkansas will submit an act on referendum to the people sometime in 1940.

Thus it may surely be said that twenty odd years of statute making and mending have not produced uniformity even in those states where compensation has become a state monopoly, nor on the other hand where compensation insurance has been left entirely to private enterprise. In fact, the contrary might well be urged since the statutes as amended have more sharply delineated rights and remedies, and the courts have carefully made distinctions that with a more liberal interpretation could have been eliminated in the interest of equitable principles.

PROCEDURE

It will be realized at the outset that procedural problems are often bound up closely with substantive principles, and although a case may be susceptible of fine analysis and the two-fold aspects carefully divided, yet for practical discussion the division need not be made. The distinction usually maintained between subrogation in case of wrongful death and subrogation upon a claim for injuries only is of frequent

²⁷ In Texas an employer's mutual insurance association has been specially created by the workmen's compensation law, and the effect is to produce a fair substitute for state funds. Kentucky has a similar mutual association sanctioned by the compensation act.

²⁸ Nebraska, Pennsylvania, Rhode Island, Connecticut, Delaware, Idaho, Illinois, Kansas, Louisiana, Minnesota, Missouri, West Virginia, New Hampshire.

occurrence. The absence of a right of action for wrongful death at common law, and the creation of such a right by statute specifically naming the parties who may bring the action and who shall be the beneficiaries is well known. There are decisions intimating that for wrongful death of an employee at the hands of a third party there can properly be no subrogation to the employer nor to the insurance company.²⁹ There are decisions that compensation acts make this possible both by direct language and by legislative intent judicially discerned.³⁰ In arriving at either result, the courts have usually considered the problem as one of substantive right compounded with procedure. If procedure were no obstacle, there should be no valid objection to applying principles of subrogation to death cases for the employer or insurance company's suit is, in a certain sense, not for the wrongful death as a statutory addition to common law but for the

²⁹ In an action at law for subrogation of the insurance carrier who had paid a death claim, the court held that under New York law, an action for wrongful death is maintainable only by the personal representatives, and any recovery is for the benefit of *all* the next of kin. The result is that suit in the name of the insurance carrier is only available to such cases when the class of persons to whom the carrier has paid compensation include all the next of kin. Subrogation is to the cause of action—not the right of action of the employee injured by a third party. *Liberty Mutual Insurance Co. v. American Incinerator Co.*, 51 F. (2d) 739 (D. C., S.D. N.Y., 1931). This disposed of count one of the insurance carrier's declaration, for the court would not allow the insurance company to split the cause of action for its benefit. The second count alleged the liability of the third party in a breach of contract with the employer (failure properly to supervise the building of a safe furnace arch for the employer, by reason of which failure the arch fell and precipitated the employee to his death). This count showed no privity between the insurer and the third party, but the plaintiff was given leave to amend if it should turn out that in the compensation policy some provision might be found giving the insurer an assignment of the rights the employer might have had in his contract with the third party furnace builder. In Oklahoma there is subrogation to the employer or insurance company but not for fatal injuries. O.S. 1931, § 13348 et seq. as amended, 85 O.S. Ann., § 1 et seq.

³⁰ In *Storrs v. Mech*, 166 Md. 124, 170 A. 743 (1934), an employer who had paid compensation to a deceased employee's dependent sister and then sought to be reimbursed by maintaining an action against the tort-feasor was faced with the argument that the Death Statute provided that recovery should be for the benefit of the wife, husband, parent, and child of the deceased and did not include a sister. The court held the Compensation Act did not create a new liability, but did enlarge the class of persons who might take advantage of the liability created by the Death Statute and in construing both acts together held the employee's sister could be included and that since the sister could have sued the third person the employer could maintain the suit for indemnity. *Coleman v. Cating Rope Works*, 286 N.Y.S. 315 (1936); *Aetna Life Insurance Co. v. Moses*, 287 U.S. 530, 53 S. Ct. 77 231, 77 L. Ed. 477, 88 A.L.R. 647 (1933); *Stiglitz Furnace Co. v. Stith's Admr.*, 234 Ky. 12, 27 S.W. (2d) 402 (1930); *Brown v. Southern Ry. Co.*, 202 N.C. 256, 162 S.E. 613 (1932).

tortious act of the third party which caused the employer or carrier to pay compensation under the act under circumstances that would have entitled the employee or his representative to an action against the third person. If substantive law were no obstacle, surely enlightened principles of procedure would not be at a loss to provide a vehicle for the employer's suit against the third party.

At the risk of prolixity, the following three situations are presented under the heading of substance and procedure.

SUBSTANCE AND PROCEDURE

In Illinois, where a farmer (expressly exempted from application of the act) was alleged to have wrongfully caused the death of an employee under the act, an appellate court dismissed a suit by the employer (who had paid compensation to the widow) claiming indemnity from the farmer, on the ground that the farmer was not a third party.³¹ Scrutinizing the act closely and interpreting it strictly, the court advanced the argument that a death action survives only by statute, to wit, the Injuries Act or the Compensation Act. The Injuries Act would have permitted the widow as personal representative of the deceased employee to sue the farmer. The Illinois Compensation Act added only the two possibilities specifically mentioned in the act—third parties *under* the act and those third parties who might otherwise be under the act but who had elected not to be bound by it. As the farmer was expressly exempted from the application of the act, the act itself was not broad enough to give the employer the right to sue the farmer.³² It is difficult to think of this case as it

³¹ *Agar Packing & Provision Co. v. Becker*, 301 Ill. App. 237, 22 N.E. (2d) 447 (1939).

³² The court construed par. 5 of Section 29 of the Illinois Workmen's Compensation Act, which provides: "In the event the said employee or his personal representative shall fail to institute a proceeding against such third person at any time prior to three months before said action would be barred at law said employer may in his own name, or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representative all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability." Ill. Rev. Stat. 1939, Ch. 48, § 166.

was disposed of other than as a mixture of substance and procedure and the decision has been criticized.³³ It surely is highly unreasonable to assume that the legislature intended to save a class of wrongdoers who are in no wise related to the compensation scheme, and the contrary intention should be presumed whether the action against the wrongdoer is by an administrator or personal representative under a wrongful death statute or whether it is by an employer who has paid compensation and thereby become subrogated under the compensation act.³⁴

In Texas, the statute provides that the employee may elect to take compensation or to sue the third person. If he accepts compensation, he thereby assigns his right of action to the state, association, or other insurer, and he may not thereafter sue at law. He is not entitled to compensation if he elects to proceed against the third party at law.³⁵ But it has been held that an injured employee or his personal representative may sue a third party even after accepting compensation if the insurer refuses to sue. The recovery, however, is limited to the excess of damages over compensation if the insurer is not a party to the suit. If the insurer would join, then complete damages could be recovered, from which sum the insurer or party paying compensation would be indemnified. The reason assigned is that the employee is the real beneficiary in cases where damages exceed the amount of compensation. Under equitable principles, the real beneficiary may sue for protection and enforcement of his rights where the person having the mere legal title through assignment by statutory operation fails or refuses to do so.³⁶ This seems to be a wholesome result, and justice to the employee, the employer, and the insurer is the objective despite the statutory statements of inability of the employee to sue after having accepted compensation. It has also been held in Texas that the insurer who has paid compensation may request the employee to bring an action for the insurer's benefit as well as his own.³⁷ It is impossible to say that procedure was here

³³ Note, 18 CHICAGO-KENT LAW REVIEW 117.

³⁴ *Botthof v. Fenske*, 280 Ill. App. 362 (1935), and cases cited therein.

³⁵ *Texas Employers Ins. Ass'n v. Brandon*, 126 Tex. 636, 89 S.W. (2d) 982 (1936).

³⁶ *Schnick v. Morris*, 24 S.W. (2d) 491 (Tex. Civ. App., 1929).

³⁷ *Galveston, H. & S. A. Ry. v. Mallott*, 6 S.W. (2d) 432 (Tex. Civ. App., 1928).

minimized, and equitable results achieved through recognition of the principles of subrogation without the necessity of specific wording in the statute, since the cases prior to the 1925 amendment of the Texas statute held there was no subrogation either expressly or by implication.³⁸

In Minnesota,³⁹ where an employee was injured and compensation under the act was promptly assumed by the employer in an amount of over \$5,000, and where physicians were furnished by the employer, the employee later commenced an action for malpractice against the physicians and settled the case for around \$1,200. The employer then gave notice of discontinuance of compensation, and petitioned the Industrial Commission to be allowed credit for the sum recovered by the employee from the physicians, and in the alternative to have the commission find that the employer and insurer were not responsible for the disability resulting from malpractice. This petition was demurred to as failing to state facts sufficient to warrant the granting of any relief thereunder. The commission sustained the demurrer, although as a matter of procedure, it was an anomaly in the practice. The Minnesota Supreme Court commendably brushed aside the anomalous character of the pleading and disposed of the question on its merits, stating that under the great weight of authority, the legitimate consequences of the accident, including unskillfulness of physicians furnished, constitute a proper claim for compensation, and are the basis for determining the extent and amount of the employee's claim. But—the employer was not permitted to take credit for the settlement nor could the employer be subrogated to the employee's claim for "damages" against the physicians, since the physicians' tort was independent, subsequent, and supplemental to the original injury.

. . . how can it be said that a physician's malpractice has anything to do with the *original injury* ("happening suddenly and violently . . . and producing at the time injury to" the employee's body) in so far as his liability is concerned to the injured workman whom he treats? . . . How can we say that the injured man's accidental hurt was here caused "under

³⁸ See note, 16 Tex. L. Rev. 437. For a complete treatise in textbook form of the Texas Compensation Law, see Lawler, *Texas Workmen's Compensation Law* (1938), Ch. XVII, and for summary of present subrogation see page 589, § 411.

³⁹ *McGough v. McCarthy Improvement Co.*, 206 Minn. 1, 287 N.W. 857 (1939).

circumstances also creating a legal liability for damages" by the malpracticing physician?

The opinion then states the inference that statutory subrogation to the employer cannot be based upon a physician's torts, although the physician's torts give rise to compensation, and this was the holding upon petition for reargument.⁴⁰

In this Minnesota case Justice Stone dissented, stating that the essential premise of the majority decision was that the employer was liable upon the *one claim* of the employee for compensation, which included damages flowing from the malpractice of the physicians. He further said, "If that is right, and I think it is, how can we say, in view of the explicit provision of subdivision 2, affirmatively granting the employer the right to subrogation, that he shall notwithstanding be denied the right?"⁴¹ Justice Stone concluded his dissent with language particularly appropriate to one of the contentions of this paper.

One word more. We are all so fond of the protection afforded by the compensation law to employes that it is easy to ignore both extent and detail of the reciprocal protection afforded employers. In proportion as this decision denies an employer the right of subrogation against a third party we are depriving him of an affirmative protection expressly granted by the statute. And we are by judicial grant giving the employe a double award which, except as to the excess of the tort recovery over the amount of compensation, the statute denies.

In the foregoing cases, cited at some length, the endeavor has been to show that subrogation was allowed or not allowed upon a consideration of public policy, an interpretation of the statute, judicial refinement of definitions, or upon a blend of substance and procedure, which a fair consideration of the

⁴⁰ Fully twenty years previously the Supreme Court of Minnesota had held that an employer was not liable for the results of any malpractice on the part of a physician he employs to treat his employee (using due care in the selection) and by reason thereof the employer was not subrogated to any claim of the employee for malpractice. *Viita v. Dolan*, 132 Minn. 128, 155 N.W. 1077, L.R.A. 1916D 644 (1916). This seems perfectly logical, and if now the employer shall be held for compensation which includes malpractice of his physician, but shall still be denied subrogation against the physician, then the statute should so state, or a public policy basis should be announced judicially.

⁴¹ To the same effect, and cited by Stone in his dissent, see *Overbook v. Nex*, 261 Mich. 156 at 161, 246 N.W. 196 at 198 (1939). "No reason why a distinction should be made between the undisputed rights of the employer to subrogate himself to the employee's rights against third parties responsible for the original injury and the right to subrogate himself when compensation has been paid for an aggravation caused by the malpractice of a third party." Same holding, *Baker v. Wycoff*, 95 Utah 199, 79 P. (2d) 77 (1938).

principles of subrogation would have eliminated, and where subrogation fairly applied could have produced a harmony and uniformity of result. If the facts of these three cases had been before the courts of the other forty-three jurisdictions, we might have had forty-three disparate results.

TIMING

Many proper cases of subrogation have been defeated by the bar of the statute of limitations. The injury or death occurs, the compensation is paid, or is awarded, and by the time the employer or insurer is in a position to know the full measure of his liability and the responsibility of some third party, the statute has run and the chance for recoupment is gone. No doubt lack of diligence might account for some of these failures, but certain situations contain inherently the impossibility of indemnity by court action.

It is generally accepted that the compensation act subrogates the employer or insurer to the cause of action of the employee. Consequently the statute begins to run against the action for subrogation, as of the time it commenced to run against the employee.⁴² That this may work hardship on the subrogee is recognized by the courts, and the judges have intimated that correction, if proper, should originate with the legislatures. It was stated in a New York case⁴³ that the court should not read into the statute an intention to create a new cause of action, even though no award is made until after the statute has run against the cause of action of the employee. This latter statement indicates the possibility of losing the right before the right has been established. If the

⁴² *Joseph Schlitz Brewing Co. v. Chicago Rys. Co.*, 307 Ill. 322, 138 N.E. 658 (1923). The Illinois Supreme Court disregarded a contrary holding in the Federal Circuit Court of Appeals (*Star Brewing Co. v. Cleveland, C.C. & St. L. Ry. Co.*) 275 F. 330 (1921), lying in the same district, in which the federal court, in interpreting the Illinois act, said that the scheme of the act contemplated the abolition of the employee's right against a third person under the act where compensation had been paid, and there was nothing to subrogate to. The act itself "created" the employer's cause of action (subrogation) and the five-year statute of limitations (otherwise two years) applied. Since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938), the federal court would now probably follow the state court interpretation of the act. For an A.L.R. annotation on a case holding with the majority view, see *J. F. Elkins Construction Co. v. Naill Bros.*, 168 Tenn. 165, 76 S.W. (2d) 326, 95 A.L.R. 1429, 1431 (1934). See also *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W. (2d) 1 (1937).

⁴³ *Exchange Mutual Indemnity Ins. Co. v. Central Hudson Gas & Electric Co.*, 243 N.Y. 75, 152 N.E. 470 (1926).

employer could estimate the responsibility of the third party and the chances of successful suit while still engaged in determining, by hearings before the commission, the character and extent of his liability under the act, and if he could then commence suit against the wrongdoer, he would never be too late.

There is a contrary view in Texas, where it has been held that inasmuch as the insurer's right of subrogation is enforceable only under the statute, which requires a final judgment against the employer or insurer, the cause of action to the employer or insurer does not accrue until the entry of final judgment. The statute of limitations applicable to the employee's right of action is therefore tolled until the entry of final judgment against the employer or insurer.⁴⁴

In Louisiana, it has been held that an employer who had paid compensation could bring suit for indemnification as upon an implied or quasi-contract, and that he should be reimbursed for money paid on account of the fault of a third party; and further, that the statute did not begin to run against such cause of action until the payment had been made, although if the employer had brought an action for subrogation under the workmen's compensation act, the statute would have run as of the time of the injury to the employee.⁴⁵

It has been quite generally held that the suit for subrogation will not lie until some significant act in the nature of assumption of the liability for compensation has taken place, but after the liability has been "fixed," "determined,"⁴⁶ "agreed to,"⁴⁷ or an "award" made⁴⁸ although not yet actually paid,⁴⁹ or perhaps to be paid only in installments

⁴⁴ *Fidelity Union Casualty Co. v. Texas Power & Light Co.*, 35 S.W. (2d) 782 (Tex. Civ. App., 1931).

⁴⁵ *Foster & Glassell Co. v. Knight Bros.*, 152 La. 596, 93 So. 913 (1922). See also *Tuckwood v. Mayor, Rotherham, etc.*, [1921] 1 K.B. 526. The idea of the Louisiana case would be quite in line with the progenitor cases of subrogation involving debtor, creditor, and surety as in *Junker v. Rush*, 136 Ill. 179, 26 N.E. 499 (1891).

⁴⁶ *Bauer v. Rusetos & Co.*, 306 Ill. 602, 138 N.E. 206 (1923).

⁴⁷ The employer or insurer may require a written assignment from the employee or his dependents before paying any compensation. Revised Statutes of Utah 1933, § 42-1-58.

⁴⁸ *Alford v. Seaboard Air Line Ry. Co.*, 202 N.C. 719, 164 S.E. 125 (1932). The court held that a formal award in writing filed under the statute was a prerequisite to the accrual of the right of the insurer.

⁴⁹ Payment of the compensation due an employee or his dependents is not a

which will run beyond the period of the statute of limitations applicable, the subrogation suit may be enforced against the wrongdoer, and the future payments computed by proper evidence.⁵⁰ Such a result, however, cannot be promised in the jurisdictions where there are no decided cases, although such a result seems fair. Actual payment should not be a condition precedent to the bringing of an action for subrogation.⁵¹ An early case, involving workmen's compensation in Indiana,⁵² wherein the insurer based the right of subrogation upon the policy contract with the employer, held that the right of subrogation would be conferred on the insurer only in the event that it had paid the whole liability due. A later case sustained the holding but distinguished conventional subrogation from statutory provision, and in the latter instance stated that statutory right arose upon determination of the liability and payment was not a prerequisite.⁵³

To return briefly to one of the underlying causes of the possibility that the Statute of Limitations will run against the subrogee's action, it may be stated that in thirty or more of the states the employee is given an option or an election to claim compensation or to bring a suit for damages against the third party. In forcing an election upon the employee, the first consideration has not been the fear that the one who paid compensation shall fail of reimbursement because of the running of the statute. Nor should this be the first consideration. What is best socially is of more importance than what is most beneficial for a commercial risk-bearer.⁵⁴ Just what is

condition precedent to the employer's exercise of his right of subrogation since the statute provides that recovery by the employer shall not be limited to the amount payable as compensation, but he may recover any amount which the employee would have been entitled to recover. But the excess shall go to the employee. The case distinguishes previous cases under which an apparent misapprehension arose as to payment being a condition precedent to subrogation. *State v. Haid et al.*, 332 Mo. 616, 59 S.W. (2d) 690 at 692 (1933).

⁵⁰ *Bauer v. Rusetos & Co.* 306 Ill. 602, 138 N.E. 206 (1923). Subrogee can recover the entire amount to the extent of "aggregate" compensation payable and not yet paid, and although the amount will be dependent upon the continued existence of the employee.

⁵¹ *Merino v. Pacific Coast Borax Co.*, 124 Cal. App. 336, 12 P. (2d) 458 (1932).

⁵² *Maryland Casualty Co. v. Cincinnati, C.C. & St. L. Ry. Co.*, 74 Ind. App. 272, 124 N.E. 774 (1919).

⁵³ *Wabash Water & Light Co. v. Home Telephone Co.*, 79 Ind. App. 395, 138 N.E. 692 (1923).

⁵⁴ See Dodd, *Administration of Workmen's Compensation*, pp. 611-616.

the latitude to be given the employee will hardly be divulged from a reading of the statutes. In a majority of the states no time is fixed within which the option or choice must be exercised, but in the jurisdictions where the statutes have fixed limits the time limits vary from as little as twenty days in Oregon⁵⁵ to as much as one year (in case of injury) and eighteen months (in case of death) in Kansas.⁵⁶ In between these limits an assignment may take place by electing to take compensation, or by failing to make an election "in writing;"⁵⁷ or by accepting compensation, then demanding that the employer bring suit, and upon his failure so to do, within six months after the injury, revesting the right of action in the employee.⁵⁸ The lack of uniformity is most obvious, and even similarity is hard to perceive.

PUBLIC POLICY

It will probably be admitted that every aspect of workmen's compensation legislation reflects a public policy. The fundamental scope and purpose were expressions of public policy toward an intolerable social situation. It is therefore little to be wondered at that the various parts of the compensation acts bear the imprint of public policy, first as announced by the legislature and secondly as perceived by the courts in the interpretation of legislative intent. The final opinion of the supreme court has often reached a conclusion at variance with the initial intent. The challenge of earlier ideas and the rules of procedure have produced some unanticipated results. That there should be some variation in the public policies of the several states was to be expected, but that an announcement of what is good for an employee, an employer, or an insurer should be met by a flat contradiction in another jurisdiction causes one to consider more closely and to wonder if both could be right since two public policies could be correct and still be contradictory. Probably the most outstanding contradiction is the legislative or judicial

⁵⁵ If within twenty days the employee fails to elect, he is deemed to have elected compensation. Oregon Code, 1933. Comp. Act. §§ 49-1814, 49-1814a.

⁵⁶ General Statutes of Kansas, 1935, and amendments of 1939, § 44-504.

⁵⁷ Colorado requires the employee to elect in writing whether to take compensation or sue the third person.

⁵⁸ North Carolina, § 11. *Rogers et al., v. Southeastern Construction Co.*, 214 N.C. 269, 199 S.E. 41 (1938).

attitude toward suits by employees against "fellow employees," and the possible sequel that the employer should thereby have subrogation against his own servant.

It has been frequently said that there is no good reason to hold that a fellow servant should not be liable for negligent or wilful acts toward anyone, for it would remove the restraint of personal responsibility,⁵⁹ and that compensation acts ought not to exempt employees negligently injuring co-employees from liability,⁶⁰ for such exemption would be obviously against public policy. This seems sound reasoning, and to hold contrariwise would be to set up the dangerous precedent that a man should be not accountable for his wrongful acts.⁶¹ Probably a majority of states would so hold, where the action is for damages in a suit brought directly by the injured employee against his fellow, unless the statute expressly anticipates and forbids the action by such words of exclusion as "not in the same employ" (Utah), or "extra hazardous employment" (Washington).⁶² It is believed by some, however, that the common-law right should be denied on social grounds, in that the hope of recovery of a larger sum in damages from a co-employee than the compensation available is a false hope, with slight prospect of fulfillment in fact, with potential danger of losing the security of compensation, and creating dissension among employees.⁶³

Where the employee is permitted to sue and recover from the fellow employee, and thereafter indemnify his employer, or where the employer pays for the injury and is thereby subrogated to the employee's common-law cause of action against his own employee, this rather logical sequel is not believed to be in the best interests of the compensation scheme, for in effect it will not be casting the burden upon

⁵⁹ *Judson v. Fielding*, 237 N.Y.S. 348 (1929).

⁶⁰ *Hall v. Hill*, 285 N.Y.S. 815 (1936). In *City of New York v. Fusco et al.*, 9 N.Y.S. (2d) 911 (1939), the contrary is suggested, but the case is decided on another point.

⁶¹ This is the argument in decision in *Lees & Sykes v. Dunkerly Bros.*, 103 L.T. (N.S.) 467, 55 Sol. Jo. 44, 5 B.W.W.C. 276 (1910), an early and persuasive case, in which the employer was subrogated to an action for indemnity from his own employees.

⁶² *Pryor v. Safeway Stores, Inc.*, 196 Wash. 389, 83 P. (2d) 241 (1938).

⁶³ As to the merits or real advantages of third party liability actions generally see *Dodd, Administration of Workmen's Compensation*, pp. 605 et seq.

industry but will be relieving the industry at the expense of one of the proposed beneficiaries, even though he may have been the original cause of the injury under the common-law view.⁶⁴ Common law and logic should give way to social justice under a public policy announced in the statutes. If the statutes fail to make this clear, it is a fair and proper task of interpretation for the courts in declaring policy.

CONCLUSION

Thirty years of experience in the operation and effect of compensation acts would appear sufficient to have given rise to certain fundamental situations in almost every state, and these fundamental situations would be of such recurrence that ample opportunity to revise, modify, and supplement the law applicable would tend to produce a certain uniformity in the forty-six states. The lack of uniformity in the organization and administration of the acts is explainable in that the sphere, importance, and permanence of administrative bodies was as yet not well recognized in the United States. Differences in the schedule of benefits available would be determined somewhat by the economic standing and the degree of industrialization of the particular state. But it seems most curious that such varied results could be obtained in the application of such old and acknowledged legal principles as those of indemnity and subrogation to such peculiarly appropriate relations as those created by the compensation acts. The value of uniform laws operating uniformly throughout the forty-eight states is well recognized but uniformity in the compensation acts will not be achieved until there is uniformity in the belief of the social objectives of such legislation, and the belief must be similarly shared by the legislatures and the judiciary, with a willingness to simplify procedure to attain the desired end.

⁶⁴ An excellent summary will be found in note, 15 *Corn. L. Q.* 148.